BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK JACKSON	)	
Claimant	)	
V.	)	Docket No. 1,058,952
	)	
AMSTED RAIL CO., INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the April 19, 2013 Award. Oral argument was held August 13, 2013. Steffanie Stracke, of Kansas City, Missouri, appeared for claimant. D'Ambra Howard, of Overland Park, Kansas, appeared for respondent.

The Award indicated claimant sustained a 20% functional impairment to the right upper extremity at the level of the shoulder due to his October 1, 2011 accidental injury. Claimant's permanent partial disability benefits under the Award were reduced by a prior 18% functional impairment rating stemming from a December 2, 2002 accidental injury and a November 24, 2003 settlement, pursuant to K.S.A. 2011 Supp. 44-501(e).

The Board adopts the Award's stipulations and has considered the record. At oral argument, the parties agreed the Board may cite the AMA *Guides*[1] (the *Guides*).

ISSUES

Claimant argues his impairment should not be reduced because both testifying physicians, Michael J. Poppa, D.O., and Mark R. Rasmussen, M.D., assigned him impairment based on his October 1, 2011 accidental injury only. Claimant argues he is entitled to at least the 10% impairment rating which Dr. Rasmussen, the treating surgeon, assigned exclusively to the October 1, 2011 accident. Respondent argues claimant failed to prove that he has permanent impairment in excess of what he previously collected for his right shoulder. Respondent requests the Board find claimant has no impairment and is entitled to zero dollars as a result of his October 1, 2011 accident.

The issues for the Board's review are:

(1) What is claimant's preexisting impairment, pursuant to K.S.A. 2011 Supp. 44-501(e)?

(2) What is the nature and extent of claimant's disability?

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

FINDINGS OF FACT

Claimant worked for respondent for 11 years as a basement helper, using a Bobcat and forklift to clean heavy industrial waste from the foundry area. He also did manual labor, including sometimes lifting wheel hubs.

Claimant had a prior work-related injury with respondent when it was called Griffin Wheel Company. On December 2, 2002, claimant injured his right shoulder.[2] Mark J. Maguire, M.D., operated on claimant's shoulder on February 13, 2003. Surgery involved repair of a complex anterior labral tear, "clean up" of the superior labrum, debridement of a posterior humeral lesion, and removal of multiple loose cartilaginous bodies, some fairly large, mainly within the glenohumeral joint. The surgical report stated, "The rotator cuff appeared to be normal."[3] Dr. Maguire indicated in the surgical report that he thought there was "some detachment of the labrum" and "some detachment over the biceps anchor."[4] It does not appear that Dr. Maguire surgically addressed the potential detachment of the labrum or the biceps anchor.[5]

Pursuant to the *Guides*, Dr. Maguire rated claimant as having an 18% impairment to the right upper extremity at the level of the shoulder for crepitation, weakness and decreased range of motion. Dr. Maguire permanently precluded claimant from using a jackhammer. At a November 24, 2003 Settlement Hearing, claimant was awarded permanent partial disability benefits based on an 18% impairment to the shoulder.

While claimant never sought medical treatment for his shoulder between 2003 and October 2011, he experienced pain every day on the top of his shoulder. He took Advil once a week for pain, which he indicated averaged a 5 on a 1-10 pain scale. He testified that due to diminished strength in his right arm, he used his left hand more frequently. He continued to work his regular job, but took more precautions.

On October 1, 2011, claimant was picking up and throwing a 60-75 pound wheel hub into a hopper when he heard a pop and felt a sensation down his right arm. He reported the incident to his supervisor about three days later and was referred to the company doctor for examination and treatment. A right shoulder MRI was performed on October 18, 2011. Respondent then referred claimant to Mark Rasmussen, M.D., a board certified orthopedic surgeon. According to Dr. Rasmussen, the MRI revealed a partial to full thickness rotator cuff tear, as well as a Type II labral tear (a SLAP tear).

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[2] All further references in this Order pertain to claimant's right shoulder.

[3] R.H. Trans., Ex. A at 19.

[4] *Id.*

[5] Rasmussen Depo. at 25-26.

Dr. Rasmussen operated on claimant's shoulder on December 8, 2011. Specifically, Dr. Rasmussen repaired the rotator cuff tear, a Type I labral tear, a Type II labral tear, as well as performed an acromioplasty for impingement and cleaned up grade III/IV chondromalacia of the anterior central glenoid and humeral head.

Claimant was released to full duty without restrictions on May 10, 2012. Dr. Rasmussen noted claimant would not require future medical treatment for the work injury, but might need future medical care for preexisting and unrelated arthritis.

At a June 20, 2012 appointment, Dr. Rasmussen reported claimant still had some soreness, but his preoperative pain was virtually gone. Dr. Rasmussen noted claimant had good range of motion and excellent strength, with no significant findings. Claimant was released at maximum medical improvement.

Claimant testified that after his second shoulder injury, the area in which he has pain is larger or wider, his shoulder is weaker, he has difficulty reaching his arm behind his body and overhead or straight away and to the side, his shoulder range of motion is decreased, and he "cannot do nothing" with his right arm.[6] He now takes Advil twice a week for pain which averages a 7 on a 1-10 pain scale.

On October 4, 2012, Dr. Rasmussen rated claimant as having a 10% impairment of the right upper extremity at the level of the shoulder pursuant to the *Guides.* Dr. Rasmussen indicated claimant's 10% rating was based on the procedures he performed – the rotator cuff and labral repair – rather than objective findings.[7] Dr. Rasmussen testified claimant had full shoulder range of motion, full strength and no crepitation and claimant would have a 0% impairment if he had used claimant's objective findings, but claimant's significant injury to the rotator cuff and the labral tear warranted a 10% impairment.[8] Dr. Rasmussen's rating was entirely attributable to the October 1, 2011 accident and no rating was given for arthritis or other conditions, including claimant's 2002 surgery.[9] Dr. Rasmussen testified it would be acceptable to either rate claimant for a surgical procedure or for factors such as range of motion and loss of strength, but not both methods, as doing so would be "double dipping."[10]

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[6] R.H. Trans. at 18-21, 34.

[7] While Dr. Rasmussen testified that his rating was based on the *Guides*, he correctly observed that the *Guides* do not state that a rotator cuff repair warrants a 10% rating. Rasmussen Depo. at 29-30.

[8] Dr. Rasmussen Depo. at 13-14, 22-23, 28-29. Dr. Rasmussen also testified that his 10% rating was based on the rotator cuff tear, the Type II SLAP tear and impingement. *Id.* at 30.

[9] *Id.* at 14, 20, 28.

[10] *Id.* at 13-15.

Dr. Rasmussen testified that both the 2003 and 2011 surgeries concerned repairing Type I and Type II labral tears, chondral injury (loss of or damage to cartilage), and injury to the humeral head (the ball of the shoulder), but the 2011 surgery was more extensive.

Dr. Rasmussen further compared the two surgeries:

> A. . . . Now, if you look at his note from 2003, Dr. Maguire mentions that he thinks the biceps has peeled off the socket, but. And he mentions that in there, but he doesn't do anything with it. So, he may have already had part of that back then, he just never really treated it. He just left it.
>
> Q. Okay. And you mentioned that the procedure that you did involved a labral tear and a chondral injury, which were the same things as –
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> A. The chondral injury I think was just cleaning up what would naturally progress from his 2002. So, I don't think he had a new chondral injury.
>
> Q. Okay. But those two items are ones that had previously been looked at in 2003, correct?
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> A. Actually, probably three of them. So, the Type I labrum, he debrided a Type I labrum back in 2003. He identified a Type II SLAP, but he didn't really treat it. And then he cleaned up the chondral injuries. So, three out of the – the only thing that was different probably this time was the rotator cuff tear and the impingement.[11]

On August 20, 2012, claimant was evaluated at his attorney's request by Michael Poppa, D.O., who is board certified in occupational preventive medicine and as an independent medical examiner. Dr. Poppa's report noted claimant had right shoulder surgery in 2002 or 2003, but also indicated claimant denied previous injuries or medical conditions requiring treatment for his right upper extremity before the 2011 work accident. Dr. Poppa testified his report should have indicated that claimant told him he did not have symptoms following his prior work injury.[12] Claimant could not recall whether he told Dr. Poppa about his every day pain following his first shoulder injury.[13] Dr. Poppa never reviewed claimant's medical records from the 2002 injury until after completing his rating report. Dr. Poppa was not aware of the extent of any preexisting crepitus, weakness or decreased range of motion when he evaluated claimant.

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[11] *Id.* at 25-26.

[12] Poppa Depo. at 11.

[13] R.H. Trans. at 28-29.

Dr. Poppa testified as to the differences between the 2003 and 2011 surgeries:

> A. The surgery performed by Dr. Rasmussen included new findings as it related to his most recent work injury, and that included a rotator cuff tear involving the supraspinatus, impingement involving his shoulder with pain, and he had actually in addition to a SLAP tear, also a Type I labral tear. And based on those findings, based on the fact that Mr. Jackson was doing well, performing his regular job duties, it's my opinion that he sustained a new and separate injury as a result of his employment at [Amsted Rail] on or around October 1, 2011.[14]

Dr. Poppa rated claimant based on how he presented at the August 20, 2012 examination.[15] Using the *Guides*, Dr. Poppa gave claimant a 28% impairment to the right upper extremity at the shoulder level, comprised of the following factors:

- a 10% impairment for distal clavicle excision/acromioplasty;[16]
- a 6% impairment secondary to mild and constant crepitation during active range of motion secondary to his recent surgery;
- a 7% impairment for decreased strength; and
- 8% for decreased range of motion, including a 3% impairment for flexion (140°), a 1% impairment for extension (45°), a 2% impairment for abduction (140°), and a 2% impairment for internal rotation (65°).[17]

Dr. Poppa issued a November 26, 2012 addendum report after reviewing additional medical records and a job description. Dr. Poppa did not apportion any of the 28% impairment to the prior injury, indicating claimant's impairment was only due to the 2011 accidental injury, because claimant recovered satisfactorily from the previous injury and surgery and was able to perform his work.[18] Dr. Poppa testified he was unaware claimant previously received a settlement based on an 18% impairment of function involving the right upper extremity at the level of the shoulder.[19]

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[14] Poppa Depo. at 20.

[15] *Id.* at 40-41.

[16] Dr. Rasmussen did not perform a distal clavicle excision. Rasmussen Depo. at 8.

[17] Under the Combined Values Chart of page 322 of the *Guides*, combining 10%, 8%, 7% and 6% ratings results in a 28% rating. The numbers, other than for range of motion, are not simply added together.

[18] Poppa Depo. at 15-16, 19, 36, 38.

[19] *Id.* at 41.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501 states in relevant part:

(e) An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(1) Where workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Where workers compensation benefits have not previously been awarded through settlement or judicial or administrative determination in Kansas, the amount of preexisting functional impairment shall be established by competent evidence.

(2) In all cases, the applicable reduction shall be calculated as follows:

(A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting. The "current dollar value" shall be calculated by multiplying the percentage of preexisting impairment by the compensation rate in effect on the date of the accident or injury against which the reduction will be applied.

In *Baxter v. L. T. Walls Constr. Co.*,[20] the Kansas Supreme Court noted:

Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury. One hundred percent permanent partial disability is not an unalterable condition and a worker may be rehabilitated and then return to work. A worker who has once been adjudged 100 percent permanently partially disabled and has received or is receiving benefits, but thereafter returns to work and is again injured while working, is not precluded from receiving benefits for the loss of wages resulting from the subsequent injury's aggravation of his disability. A disabled worker may receive disability benefits more than once, but the worker may not pyramid benefits and receive in excess of the maximum weekly benefits provided by statute.[21]

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[20] 241 Kan. 588, 738 P.2d 445, 449 (1987).

[21] *Id.* at 593; see also *Langel v. Brighton Gardens*, No. 98,684, 188 P.3d 977 (Kansas Court of Appeals unpublished opinion dated Aug. 1, 2008). Cf. *Kirker v. Bob Bergkamp Constr. Co.*, *Inc.,* No. 107,058, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion dated October 12, 2012).

K.S.A. 2011 Supp. 44-501(e)(1) appears to represent a departure from prior case law interpreting prior statutes concerning deductions for preexisting impairment. However, the Kansas Court of Appeals recently commented, "K.S.A. 44-501(e), enacted after *Baxter*, provides that an award of compensation is to be reduced by the amount of functional impairment determined to be preexisting; this statute does not alter the holding of *Baxter* that the recovery and reinjury be established by medical evidence and not simply assumed by the ALJ to be preexisting based on ratings from the prior claim."[22]

K.S.A. 2011 Supp. 44-501b(b) states the employer is liable to pay compensation when an employee suffers personal injury by accident or repetitive trauma arising out of and in the course of employment. Claimant carries the burden of proof.[23]

K.S.A. 2011 Supp. 44-508 states in relevant part:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.
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> . . .
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> (u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

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[22] *Meza v. National Beef Packing Co., LP*, No. 108,768, slip op. at 9 (Kansas Court of Appeals unpublished opinion dated Aug. 16, 2013, *pet. for review filed* Sept. 11, 2013). Kansas Supreme Court rule 8.03(i) states the timely filing of a petition for review stays the Court of Appeals' ruling. Pending the Supreme Court's determination on the petition for review, or the Supreme Court ruling on the case based on the merits, *Meza* is not binding and, while noted, does not impact the Board's ruling.

[23] K.S.A. 2011 Supp. 44-501b(c).

The scheduled injury statute, K.S.A. 2011 Supp. 44-510d states in part:

> (b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . .
>
> (13) For the loss of an arm, . . . including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
>
> . . .
>
> (23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

In *Bergstrom*,[24] the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should orshould not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained.[25]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability; the trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[26]

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[24] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[25] *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998).

[26] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Board notes, however, that *Tovar* predates the 1993 amendments to the Kansas Workers Compensation Act mandating that impairment be based on the *Guides*.

ANALYSIS

(1) Claimant has an 18% preexisting impairment to his right upper extremity at the level of the shoulder.

This is the first Board case to address the application of K.S.A. 2011 Supp. 44-501(e)(1). Under the statute, a prior award or settlement in Kansas conclusively establishes the amount of preexisting impairment. As noted in *Wiehe*,[27] "a conclusive or irrebuttable presumption is not a presumption at all; it is a substantive rule of law directing that proof of certain basic facts conclusively provides an additional fact which cannot be rebutted."[28] While K.S.A. 2011 Supp. 44-501(e)(1) does not use the term "conclusive presumption," having a fact *conclusively established* is a distinction without difference.

Under K.S.A. 2011 Supp. 44-501(e)(1), the prior Kansas settlement conclusively establishes that claimant had a preexisting 18% impairment of function involving his right upper extremity at the level of the shoulder. Even if claimant were, as noted by Dr. Poppa, doing well physically and able to do his work without issue (which is factually inaccurate), the statute conclusively establishes the degree of preexisting impairment.

(2) Claimant is awarded permanent partial disability benefits based on a 20% functional impairment to his right upper extremity at the level of the shoulder, less the current dollar value reduction for his preexisting 18% functional impairment.

The Award indicated claimant had a 20% impairment to the arm at the level of the shoulder stemming from the October 1, 2011 accident, based on a compromise of the ratings. Such rating is not a pure split of the 10% rating from Dr. Rasmussen and the 28% rating from Dr. Poppa. A true split of the ratings would be 19%. *Tovar* indicates that the trier of fact may award benefits by adjusting the medical and lay evidence, so the finding of a 20% rating appears to be within the judge's discretion. While the Board is uncertain how the 20% rating was computed, we find no error in the result. The Award properly applies the plain language of K.S.A. 2011 Supp. 44-501(e) by reducing the value of claimant's 20% functional impairment by the current dollar value of his 18% preexisting impairment. Thus, the Board affirms the Award.

The Board strongly considered, but declined to adopt, alternative approaches to determining claimant's current award. These options flowed from either a sense that it was inequitable to award claimant less than the value of the treating orthopedic physician's rating, a belief that an award essentially based on a 2% rating was insufficient, or perhaps because K.S.A. 2011 Supp. 44-501(e) does not necessarily address a situation where claimant's new impairment is distinct from his preexisting impairment.

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[27] *Wiehe v. Kissick Const. Co.*, 43 Kan. App. 2d 732, 232 P.3d 866, 874 (2010).

[28] *Id.* at 743.

In one hypothetical option, a statutory reduction for preexisting impairment would be inapplicable where the evidence establishes that claimant's impairment from the 2011 accident is wholly distinct and separate from his preexisting impairment. Dr. Rasmussen's 10% rating was above, beyond, separate and distinct from claimant's preexisting 18% impairment. The Board could conclude that claimant's prior impairment is not preexisting in relation to his brand new impairment occasioned by the new injury and that no deduction for preexisting impairment would necessary. Adopting Dr. Rasmussen's rating would only result in claimant being compensated for new impairment. However, doing so would ignore the statute's mandate to reduce an award by impairment determined to be preexisting.

The Board considered awarding claimant a 10% rating based on the fact that he had new and different injuries. However, K.S.A. 2011 Supp. 44-501(e) clearly and unambiguously states that "an award of permanent partial impairment . . . shall be reduced by the amount of functional impairment determined to be preexisting." The statute does not say the reduction only applies to that part of the current award of permanent disability which "overlaps" prior impairment or prior injured body parts. The notion that the reduction for preexisting functional impairment is inapplicable in this claim because claimant's current accident resulted in a rotator cuff tear, which was uninjured in the previous claim, is inconsistent with the provisions of the Act concerning scheduled injuries. Under K.S.A. 2011 Supp. 44-510d, scheduled injuries specifically include injuries to a shoulder, for which not more than 225 weeks of compensation may be paid. The statute does not provide weeks for injuries to particular structures encompassed in the shoulder – such as 225 weeks for a rotator cuff tear, another 225 weeks for a rupture of a biceps tendon, another 225 weeks for a shoulder dislocation or yet another 225 weeks for a clavicle fracture.

Given the fact that the new permanent impairment identified by Dr. Rasmussen in 2012 would not duplicate permanent impairment identified by Dr. Maguire in 2003, the Board could find it appropriate to combine the claimant's overall impairment – from both the 2002 and 2011 injuries – based on the Combined Values Chart on page 322 of the *Guides* – before applying the reduction for preexisting impairment. In this hypothetical option, the Board could have included Dr. Maguire's prior 18% impairment in assessing claimant's overall impairment before applying the statutory reduction. It arguably makes some sense that if claimant's award is reduced by unrelated preexisting impairment, that such prior impairment be acknowledged as impacting his overall impairment, instead of only to reduce his award. Claimant's preexisting impairment from his 2002 injury was permanent and existed immediately prior to his new additional 10% impairment in 2011. The new impairment was above and beyond the 18% rating that permanently impaired claimant before the second shoulder injury. Combining claimant's prior, permanent 18% rating with his new 10% rating would result in an overall 26% rating. Under the Combined Values Chart, the numbers would not simply be added together to arrive at a 28% impairment rating. Deducting the current dollar value of the prior 18% rating from a 26% rating would result in claimant currently receiving permanent partial disability benefits based on an 8% impairment rating. However, K.S.A. 2011 44-501(e) does not instruct the judge or the Board to look at overall impairment or to combine any preexisting impairment before reducing an award by the prior impairment.

As an aside, the Board does not find Dr. Poppa's rating in this case to be particularly reliable. Dr. Poppa's rating, despite his testimony, is based on claimant's overall condition, not simply for the 2011 accidental injury. Dr. Poppa was unaware of claimant's prior 18% rating. Dr. Poppa rated claimant for a surgery (distal clavicle excision) that did not occur and he was unaware of claimant's ongoing complaints from 2002 forward. The bulk of Dr. Poppa's rating overlaps conditions for which claimant was rated in 2003, including crepitation, weakness and lost range of motion. Moreover, Dr. Poppa did not have the benefit of claimant's testimony that he had ongoing, daily pain, which he rated at a 5 on a 1-10 pain scale, he had decreased strength, he needed to use his left arm more and he needed to be cautious when performing his work. As indicated in the Award, Dr. Poppa seemed to think claimant was symptom-free before October 1, 2011, which was an inaccurate assumption. The Board could have reduced Dr. Poppa's 28% rating by the current dollar value of his 18% preexisting impairment, which would essentially award claimant benefits based on a 10% rating, the same rating assigned by Dr. Rasmussen as being new impairment, but doing so would lend credence to a medicolegal opinion that rests on inaccuracies and assumptions.

Unlike the dissenting Board Member, the majority finds Dr. Rasmussen's rating credible. The *Guides* do not specifically comment on providing a rating for rotator cuff or labral tears, which formed the basis for Dr. Rasmussen's rating. A physician may properly rate a condition based on his or her judgment where the condition is not accounted for in the *Guides*.[29] In *Smith*, the Court of Appeals noted that a testifying physician's rating which was partially based on sacroiliac joint dysfunction, a diagnosis not covered in the *Guides*, was proper. The dissenting Board Member is correct that the *Guides* generally address the shoulder. However, the *Guides* only address impairment for a total shoulder arthroplasty or distal clavicle surgery, but do not address surgery for rotator cuff or labral tears.[30] Hence, the *Guides* do not necessarily account for rotator cuff tears or labral tears. As such, Dr. Rasmussen's rating is proper. Nonetheless, for reasons stated above, the Board affirms the Award.

CONCLUSIONS

Having reviewed the entire evidentiary file and considered the parties' arguments, the Board affirms the Award. Claimant had a preexisting 18% impairment to the arm at the level of the shoulder. His current 20% impairment to the arm at the level of the shoulder is reduced at the current dollar value of his preexisting 18% impairment rating.

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[29] K.S.A. 44-510d(b)(23); see *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

[30] *Guides*, Ch. 3, p. 61.

AWARD

WHEREFORE, the Board affirms the April 19, 2013 Award.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable William Belden

DISSENTING OPINION

This Board Member respectfully dissents from the majority opinion. This Board Member would find that in addition to Dr. Poppa's rating not being reliable, the same is true for Dr. Rasmussen's rating. Dr. Rasmussen's rating is not based on the *Guides*. The *Guides* provide various methods to rate the shoulder, such as being based on abnormal range of motion, peripheral nerve disorders, vascular disorders, bone and joint deformities, crepitation, motor deficits and loss of power, and strength.[31] As Dr. Rasmussen acknowledged, had he rated claimant using criteria listed in the *Guides*, he would have provided a 0% impairment. Dr. Rasmussen can only deviate from using the *Guides* if the impairment is not "contained therein."[32] Claimant's impairment is contained within the *Guides*: 0%. Dr. Rasmussen's rating was simply based on his subjective belief that claimant's injury and surgery warranted a rating. Dr. Rasmussen's 10% rating was created out of thin air and is not based on the *Guides*. This Board Member would find that claimant has failed to prove he suffered a permanent impairment from his 2011 accident.

_____
BOARD MEMBER

[31] See *Guides*, p. 41-67.

[32] K.S.A. 2011 Supp. 44-510d(23).